Chai Koh Shon v Public Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q–02–230 OF 2002
DENIS ONG, MOHD NOOR AHMAD AND ALAUDDIN JJCA
2 JUNE 2004

Land Law — Charge — Order for sale — Sale of land by way of private treaty — Whether consent of chargee required — Whether approval of court to be obtained — Sarawak Land Code, ss 148(2)(c), 150(1)

The appellant was the registered proprietor of two pieces of land and had charged the first piece of land for RM300,000 for an overdraft facility for a customer and subsequently for an aggregated sum of RM50,000 to the respondent (successor-in-title of Hock Hua Bank Bhd) on 26 January 1995. He then charged the second piece of land for a sum RM350,000 to the respondent for an overdraft facility for a customer. Both customers exceeded the limits of the overdraft facility. The respondent notified appellant of the termination of both facilities and further gave 30 days' notice to settle the amount. The appellant failed to settle the outstanding amount and Hock Hua Bank Bhd commenced charge actions. A sale by public tender was fixed for 14 September 2000 at reserve prices of RM358,000 and RM393,000 respectively but no tender was received. The reserved prices were then reduced to RM340,000 and RM374,000 respectively.

The appellant applied under O 83 r 1 of the Rules of the High Court 1980 ('the RHC') for an order to redeem the said lands upon payment by the appellant to the respondent of RM350,000 each or at a sum allowed by the court, and secondly, for an order that the appellant maybe at the liberty to sell the two pieces of land by private treaty or otherwise for the purposes of discharging the three charges or alternatively may be sold with approbation of the judge or allow the appellant to redeem it. The application was dismissed.

The appellant appealed against the High Court's decision on the issue of the redemption sum payable to the respondent as chargee in respect of each lots. The issue before this court was whether s 150(1) empowers the court to make and enables the chargor to apply for an order of sale of charged land.

Held, dismissing the appeal:

(1) There was no mention of s 150 specifically or otherwise in the heading or body of originating summons or in the affidavits in support or opposition of both sides (see para 24).

(2) Section 148(2)(c) of the Sarawak Land Code (' the SLC') is substantive and enables the chargee to apply for and empowers the court to make an order of sale and the sale if ordered is a judicial sale. Section150(1) the SLC is entirely procedural in the sense that it provides for the procedure for the judicial sale so ordered: it specifies the mode of judicial sale, ie by public auction, public tender or such other mode of sale as the court directs, and sets out the steps to be followed by the chargee or a third person for the order of sale to be carried into effect (see para 39).

(3) There was nothing in the SLC which required an order of sale or approval of the court was required. The facts of the case denote that there was no evidence (documentary or oral) of a contract by private treaty, no third party was named or suggested and no price was mentioned for the lots in question. In addition, there was lack of prior consent in writing of the chargee. Thus, s 150(1) did not apply to the appellant as chargor in the sense that it does not enable the appellant to initiate a charge action to apply to the High Court for, nor does it empower the court to make an order of sale (see paras 43, 45 and 46).

[Bahasa Malaysia summary

Perayu adalah tuan punya dua bidang tanah dan telah menggadai tanah pertama untuk kemudahan overdraf yang bernilai RM300,000 bagi pelanggannya dan seterusnya untuk jumlah agregat bernilai RM50,000 kepada responden (pengganti hakmilik Hock Hua Bank Bhd) pada 26 Januari 1995. Berikutnya, dia menggadai tanah kedua kepada responden untuk mendapatkan kemudahan overdraf bernilai RM350,000 bagi pelanggannya. Kedua-dua pelanggan telah melampaui had kemudahan overdraf mereka. Responden memaklumkan perayu akan penamatan kemudahan-kemudahan tersebut dan notis 30 hari diberikan kepadanya untuk menyelesaikan hutang tersebut. Perayu gagal menjelaskan hutang tersebut dan Hock Hua Bank Berhad memulakan tindakan gadaian. Jualan melalui tender awam telah ditetapkan pada hari 14 September 2000 dengan harga rizab bernilai RM358,000 dan RM393,000 masing-masing akan tetapi tiada tender diterima. Harga rizab kemudiannya dikurangkan kepada RM340,000 dan RM374,000.

Perayu memohon untuk mendapatkan perintah di bawah A 83 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 supaya perayu boleh mendapatkan balik kedua-dua tanahnya dengan menjelaskan hutang sebanyak RM350,00 untuk setiap lot tanah atau nilai yang ditetapkan oleh mahkamah dan keduanya, untuk perintah memberikan kuasa kepada perayu untuk menjual kedua-dua tanah melalui triti persendirian ataupun dengan pelepasan ketiga-tiga gadaian atau menjual dengan perasingan penghakiman atau membolehkan perayu menebus balik tanahnya. Permohonannya ditolak.

Perayu membuat rayuan terhadap keputusan mahkamah terhadap isu penebusan wang yang perlu dibayar kepada responden sebagai pemegang gadaian untuk lot-lot. Isu di hadapan mahkamah ini adalah sama ada s 150(1) memberi kuasa kuasa kepada mahkamah dan membenarkan penggadai memohon untuk perintah jual tanah yang digadaikan.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 150 tidak dirujuk secara khusus dalam kes ini ataupun pada saman pemula atau dalam affidavit sokongan atau dalam affidavit dari kedua-dua pihak (lihat perenggan 24).

(2) Seksyen 148(2)(c) adalah undang-undang substantif dan membolehkan pemegang gadaian menggunakannya dan memberi mahkamah kuasa

untuk memohon perintah jualan dan jika diperintah ia merupakan jualan kehakiman. Seksyen 150(1) pula adalah prosedural pada keseluruhannya kerana ia menyediakan prosedur untuk jualan kehakiman yang diperintah: ia menentukan cara jualan kehakiman melalui lelong awam, tender awam atau cara jualan yang lain yang diarah oleh mahkamah dan memberikan cara-cara untuk diikuti oleh pemegang gadaian atau pihak ketiga supaya perintah jualan dapat dilaksanakan (lihat perenggan 39).

(3) Tidak terdapat apa-apa dalam Bab 81 (Sarawak) yang menyatakan bahawa perintah jualan ataupun kebenaran mahkamah diperlukan. Fakta-fakta dalam kes ini menunjukkan bahawa tidak ada keterangan (dokumentari atau secara lisan) yang menunjukkan kewujudan kontrak melalui triti persendirian dan tiada nama pihak ketiga disebut serta tidak ada harga lot-lot tersebut dinyatakan. Tambahan pula kebenaran bertulisan tidak diperolehi terlebih dahulu oleh pemegang gadaian. Maka s 150(1) tidak terpakai ke atas perayu sebagai penggadai di mana ia tidak membolehkan perayu memulakan tindakan gadaian di Mahkamah Tinggi ataupun memberi kuasa kepada mahkamah untuk memberi perintah jualan (lihat perenggan 43, 45 dan 46).]

Notes

For cases on order for sale, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1939–2020.

For charges generally, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [150.343]–[150.380].

Cases referred to

Ho Giok Chay v Nik Aishah [1961] MLJ 49 (refd)

MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming,) Intervener [1992] 2 MLJ 642 (refd)

T Damodaran v Choe Kuan Him [1979] 2 MLJ 267 (refd)

United Malayan Banking Corp Bhd v Chong Bun Sun and another application [1994] 2 MLJ 221 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2), Schedule, para 3

National Land Code s 256

Sarawak Land Code (Cap 81) ss 113, 119, 143(2), (3), 145(1), 148(2)(c), 150(1)

Rules of the High Court 1980 O 83 r 1

Appeal from: Orginating Summons No 24–179 of 2001 (High Court, Sabah and Sarawak)

Tai Choi Yu (Tai Choi Yu & Co) for the appellant.

Louis Achuk (Kadir Wong Lin & Co) for the respondent.

Denis Ong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the plaintiff, the appellant herein, against the judgment of the High Court in Miri Sarawak which, on 1 March 2002, dismissed his application by way of originating summons seeking firstly, an order of court to fix the redemption sum for two parcels of land in Miri Sarawak initially charged to the Hock Hua Bank and latterly to the Public Bank Bhd its successor-in-title, the defendant in the High Court and the respondent herein, under three separate memorandum of charge; and secondly, for an order of sale by private treaty of the charged lands to pay for the redemption sum so fixed and thereby to discharge the charges.

FACTS AND BACKGROUND

[2] The appellant is the registered proprietor of:

(a) all that parcel of land together with the building thereon and appurtenances thereof situated at 1/2 mile, Riam Road, Miri, containing an area of 4747 square metres, more or less and described as Lot 293 Block 1 Lambir Land District ('Lot 293'); and,

(b) all that parcel of land together with the building thereon and appurtances thereof situate at Riam Road, Miri, containing an area of 4,047.0 square metres, more or less and described as Lot 3892 Lambir Land District ('Lot 3892').

[3] By a third party charge bearing Instrument No L 696/1995 registered at the Miri Land Registry Office on 26 January 1995 the appellant, as the chargor, charged Lot 293 to the Hock Hua Bank Bhd, the chargee, as security for all sums of money and interest payable to it by one Chai Pik Ngok, the customer, for advances credit and banking facilities granted for the use of the customer by way of fluctuating overdraft or otherwise up to an aggregate sum of RM300,000. The respondent is the successor-in-title of Hock Hua Bank Bhd pursuant to a court order and is substituted for the latter as the chargee.

[4] By another third party charge bearing Instrument No L 8651/1996 registered at the same office on 23 August 1996, the appellant further charged Lot 293 to Hock Hua Bank Bhd as security for the payment of the same facilities granted for the use of the same customer, this time, up to an aggregate sum of RM50,000. This charge is expressed to be subject to the charge under Instrument No L 696/1995. Likewise, the respondent succeeds to the charge as the chargee.

[5] By another third party charge bearing Instrument No L 11877/1996 registered at the same office on 23 November 1996 the appellant charged Lot 3892 to Hock Hua Bank Bhd as security for the payment of similar fluctuating overdraft facilities granted for the use of another customer, a firm by the name of Janjanbo Trading Company, up to a limit of RM350,000 and likewise the respondent succeeds as the chargee.

[6] There is no dispute that these customers namely, Chai Pik Ngok and Janjanbo Trading Company exceeded the limits of the overdraft facilities

granted to them without regularising the excess. In the case of the former, the limit was stated to be RM1,450,000. As at 31 March 1998, the total amount outstanding under current account No C/A 04998-5 under which such overdraft facilities were operated was stated to be RM1,763,312.81, an excess of RM513,312.81. Likewise, in the case of the latter, the total amount under current account No C/A 06780-9 was stated to be RM1,311,540.98 as at the same date, an excess of RM321,540.98 over the stated limit of RM990,000. By separate letters of the same date, 29 April 1998, (exhs CKS5 and CKS4 respectively), Hock Hua Bank Bhd notified the appellant of the termination of both facilities and further gave 30 days' notice to him under s 148 of the Sarawak Land Code (Cap 81) to settle the outstanding amounts respectively together with accrued interest, failing which Hock Hua Bank Bhd will resort to all remedies available including an application for an order of sale by public tender of Lot 293 and Lot 3892.

[7] The appellant failed to settle and on 16 November 1998, Hock Hua Bank Bhd commenced charge actions in the Miri High Court under O 83 of the Rules of the High Court 1980 ('the RHC') under Originating Summons Nos 24–285–98 and 24–286–98 respectively for orders of sale by public tender of (amongst other lands of the appellant charged to Hock Hua Bank Bhd) Lot 3892 and Lot 293.

[8] On 30 June 1999, orders of sale of the charged lands including Lot 293 and Lot 3892 by public tender were made by the judicial commissioner in the absence of the appellant or his counsel. Sale by public tender was fixed for 14 September 2000 at the reserve prices of RM358,000 for Lot 3892 and RM393,000 for Lot 293. But no tender was received. The reserve prices were reduced to RM340,000 for Lot 3892 and to RM374,000 for Lot 293. Notices of sale (exhs CKS10 and CKS11) were published in the *Miri Daily News* fixing the sale by public tender for 12 July 2001.

[9] By Originating Summons No 24–179–2001 (MR) dated 29 October 2001 supported by an affidavit affirmed by the appellant on 31 October 2001 the appellant applied under O 83 r 1 and the inherent jurisdiction of the court for:

1 an order that, upon payment by the appellant to the respondent of RM350,000 each or such sum as may be allowed by the court for Lot 3892 and Lot 293 respectively, the appellant may be at liberty to redeem them;

2 an order that the appellant may be at liberty to sell Lot 3892 and Lot 293 out of court by private treaty or otherwise for the purpose of discharging the three charges or alternatively that Lot 3892 and Lot 293 may be sold with the approbation of the judge or alternatively that the appellant may be let in to redeem.

[10] The application was opposed by the respondent who filed an affidavit in opposition affirmed on 20 November 2001 by its assistant branch manager named Teng Tung Ming.

[11] The application was heard before another judicial commissioner on 9 January 2002 and on 1 March 2002, he dismissed the application of the appellant and awarded no costs to the parties.

[12] On 28 March 2002, the appellant filed a notice of appeal of the same date against the whole of the decision of the judicial commissioner and subsequently, a memorandum of appeal dated 7 May 2002. At the hearing before us on 13 March 2003, a supplementary appeal record was filed without objection from the learned counsel for the respondent and upon payment of the court fees. The supplementary appeal record consisted of a supplementary memorandum of appeal, the judgment and order of the High Court.

[13] We pause here to observe that there appears to be a *lacuna* in this statement of the background to the proceedings. The query here is what happens to the two orders of sale both dated 30 June 1999 of the High Court and to the notices of sale (exhs CKS10 and CKS11) published in the *Miri Daily News* mentioned above. Neither the appeal record, the supplementary appeal record nor the chronology of events provide a clue as to their fate. However, in their respective outline submissions, both counsel for the appellant and the respondent acknowledged for a fact that the two orders of sale were set aside by the Miri High Court on 12 July 2001 on the application of the appellant and the sale by public tender did not proceed as fixed in the notices of sale. It is recorded for a fact in the judgment of the High Court that the two orders of sale were set aside.

[14] We observe further from the outline submission of counsel for the respondent that subsequently the respondent commenced fresh charge actions namely, Originating Summons No 24–93–2002 (MR) and Originating Summons No 24–122–2002 (MR) for orders of sale of Lot 3892 and Lot 293 respectively and on 21 January 2003 such orders of sale were granted. The outline submission of the appellant is silent on this point.

In the High Court

[15] At the outset of the hearing, the court allowed an oral application by the appellant to amend the third heading of the originating summons by adding the words 'under and by virtue of s 145 of the Sarawak Land Code' upon a preliminary objection by counsel for the respondent that the application ought to be dismissed because the court has no power to grant the order of redemption or for the sale by private treaty under O 83 r 1 of the RHC or under its inherent jurisdiction.

[16] The issues identified by the court are:

(1) (a) whether the appellant as chargor of Lot 3892 and Lot 293 was entitled to redeem them; and if so, (b) what were the redemption sums payable to the respondent as chargee in respect of each Lot; and,

(2) Whether the court has the power under O 83 r 1 of the RHC or under its inherent jurisdiction to make an order of sale by private treaty.

[17] On issue (1)(a) the court held that the appellant was entitled to redeem Lot 3892 and Lot 293 under s 145 as both of them had not been actually sold under any power of sale, subject to the repayment of all moneys due and owing by the appellant at the time of repayment under charge Instrument Nos L 11877/1996, L 696/1955 and L 8651/1996. As to issue (1)(b)

it held that in the context of the application before it, the words 'payment of all moneys due and owing under the charge' in s 145(1) of Cap 81 (Sarawak) meant 'the repayment to the chargee of the principal sum together with all interest thereon and all other whatsoever moneys payable by the chargor … under the said charge' in cl 57 of such charge instrument. In short, the formula for working out the redemption sum in respect of each lot is that set out in cl 57.

[18] On issue (2) it held that the court had no power to order a sale of Lot 3892 and Lot 293 by private treaty (a) because O 83 did not state the manner in which the court may direct the sale to be conducted and (b) because there were no express provisions in Cap 81 (Sarawak) to enable the court to make such an order. However, in its view there was nothing in Cap 81 (Sarawak) to stop the appellant from selling these Lots by way of private treaty with the consent of the chargee without an order of the court.

[19] In the premises, it dismissed the application of the appellant but made no order as to costs. It intimated that on the basis of the holding of the court on issue (1) alone, that would be good reason enough to dismiss such an application.

In the Court of Appeal

Preliminaries

[20] At the outset of the hearing before us, counsel for the appellant informed that he abandoned grounds 2.1, 2.2 and 2.3 of the memorandum of appeal which challenged the holding of the court on issue (1)(b) and so it was recorded.

[21] Counsel further informed that he wished to proceed only on grounds 1, 3, 4, 5 and 6 which disputed reason (b) of the court for its holding on issue (2) namely, that there were no express provisions in Cap 81 (Sarawak) to enable the court to make an order of sale by private treaty. In this regard he submitted that the learned judge made an error when he stated in his judgment that the learned counsel for the defendant had correctly pointed out that there were also no express provisions in Cap 81 (Sarawak) to enable the court to make such an order. That statement appeared at p 25B of the supplementary appeal record. For better understanding of that statement in its context, we reproduce below the text of the relevant paragraph in which it (underscored) was found and also the paragraph immediately preceding:

> I now turn to consider the second prayer sought by the plaintiff. The question to be asked is whether the court has the power under O 83 r 1 of the RHC or under its inherent jurisdiction thereunder to make an order for sale by private treaty. The learned counsel for the defendant submitted that the court has no such power. In support he relied on the decision of Visu Sinnadurai J in the case of *United Malayan Banking Corp Bhd v Chong Bun Sun and another application* [1994] 2 MLJ 221. In that case the court was faced with the same issue in dealing with an application under the National Land Code 1965 for the sale of charged property by way of private treaty. The learned judge stated at p 680, as follows:
>
> '... it should be noted that O 83, unlike O 31, does not state the manner in which the court may direct the sale to be conducted ... . The manner of the sale, and

the details thereof are therefore, governed by the NLC. As seen earlier, the NLC only envisages one manner of sale which may be ordered by the court — sale by public auction.'

(See also *Chung Khiaw Bank Ltd v Lau Ah Yen & Anor* [1989] 2 MLJ 249, *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805)

I am in agreement with the observation made by his Lordship on this issue. *The learned counsel for the defendant had correctly pointed out that there are also no express provisions in the Sarawak Land Code to enable the court to make such an order. …* (Emphasis added.)

Appellant's arguments

[22] He submitted that express provisions for the sale by private treaty can be found in s 150(1) of Cap 81 (Sarawak) and that the court has the jurisdiction to grant such an order. He argued that:

(a) the provisions of s 150(1) corresponded to those of s 256 of the National Land Code ('the NLC');

(b) s 148 of Cap 81 (Sarawak) enabled a charges to apply to the court for the sale of land subject to a charge;

(c) s 150 was an independent section, ie not dependent on s 148 and that anyone interested in the land may apply for its sale. However, if the land was subject to a charge, the conditions relating to its sale were laid out in s 150;

(d) to grant an order of sale or not was a discretion to be exercised by the court;

(e) under s 150 the court had the power to determine the mode of sale, ie by public auction, public tender or private treaty, on the application by an intervener; and,

(f) the court was empowered to authorize such other acts necessary for the conduct of the sale.

Respondent's response and arguments

[23] Counsel for the respondent informed the court that he relied on his supplementary submission dated 1 April 2003 in which he made the following points:

(i) that the appellant's application before the High Court was not made under s 150 but under O 83 and the inherent jurisdiction of the court and the issue of s 150 was neither raised in the appellant's affidavits nor in his submission there. It was raised for the first time before us here and he submitted that the appellant was not entitled to rely on para 1 of his memorandum of appeal;

(ii) that there was no express provision in Cap 81 (Sarawak) to enable the court to make an order of sale by private treaty as the High Court observed;

(iii) that s 150(1) must be read as a whole with s 151 of Cap 81 (Sarawak) so that the phrase 'by such other means as it may deem fit' in s 150(1) cannot be extended to include sale by private treaty (see *Kimlin Housing Development Sdn Bhd (Appointed Receiver & Manager) (In Liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805);

(iv) by way of comparison with the NLC, it was decided in the Supreme Court case of *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 that under that Act there was nothing to prevent a chargor with the consent of the chargee to sell charged property by private treaty and that there were no specific provisions in that Act for such a sale. But if such a sale was concluded as a purely business arrangement, it was for the chargee to discharge the charge to give full effect to the sale;

(v) in *United Malayan Banking Corp Bhd v Chong Bun Sun and another application* [1994] 2 MLJ 221, his Lordship Visu Sinnadurai J held that there was no express provision in the NLC enabling the court to order a sale of charged land by way of private treaty; and obiter, a sale by private treaty can be made by the chargor with the consent of the chargee;

(vi) in the present case:

(a) the chargee had not given its consent;

(b) the selling price was never revealed by the appellant; and

(c) the appellant's proposed redemption figure was not sufficient to settle the amount owing to the respondent.

FINDING OF COURT ON PRELIMINARIES

[24] We have carefully perused the appeal records and are satisfied for a fact that there is no mention of s 150 specifically or otherwise in the heading or body of Originating Summons No 24–179–2001 (MR) or in the affidavits in support or opposition of both sides. We further agree with counsel for the respondent that the issue of s 150 was not raised in the written submissions of both sides and there was no record of any argument canvassed on such issue in the judge's notes at first instance. We agree also that the issue of s 150 was raised for the first time before us. Nonetheless we heard submissions from both counsel, in outline and orally because it bears on reason (b) for the holding of the High Court on issue (2).

Question of Law, Reasoning and Holding of Court

[25] It was apparent to us from the submission of counsel for the appellant that the appellant was desirous of selling the charged lands, ie Lot 3892 and Lot 293 by way of private treaty and the larger question was whether he, as the chargor, can do so without the consent of the respondent, the chargee, but with the approval of the court under s 150(1) of Cap 81 (Sarawak).

[26] It is a fact that the appellant is the sole registered proprietor of Lot 3892 and Lot 293. Title, ownership and possession of these Lots vest in him alone. It is an incident of such proprietorship that the appellant has the legal right to deal with these lots including their disposal by private treaty to whomsoever he pleases for valuable consideration.

[27] However Lot 3892 and Lot 293 have been charged by the appellant to the respondent as securities for the repayment of overdraft and banking facilities granted by the latter to the former. These charges are registered with the Miri Land Registry Office under Instrument Nos L 696/1995 and L 8651/1996 as the first and second charges respectively on Lot 293; and under L 11875/1996 on Lot 3892. By operation of ss 119 and 113 of Cap 81 (Sarawak) and the operative parts of these instruments, these Lots have been rendered liable as securities for all sums of money and interest that may be payable thereunder. Thus, by these charges, the respondent, as chargee, has acquired an interest in these Lots and a right to sell them under s 148 in the event of default in repayment by the chargor (see *Ho Giok Chay v Nik Aishah* [1961] 27 MLJ 49). And the interest so created is a legal interest short of proprietorship (see *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267 (PC) at p 269F).

[28] On the register and the issue documents of title, the appellant is still the registered proprietor notwithstanding the registered charges. This means that title, ownership, possession and the right to deal with these lots continue to be vested in the appellant alone as the registered proprietor. However, the interests of the respondent as chargee will have been registered in the register and the issue documents of title by an entry of an appropriate memorial each on the register and on such documents of title to the effect that these lots have been charged to the respondent as securities and the relevant Instrument Nos duly noted.

[29] Clause 16 of these Instruments so far as is relevant reads thus:

> Dealings with security
>
> 16 The Chargor(s) will not transfer, sell, charge or otherwise howsoever deal with the Said Land or any part thereof or any interest therein or ... without the written consent of the Chargee first had and obtained.

[30] Clause 16 appears to have been modelled closely on the caveat covenant in s 143(2) of Cap 81 (Sarawak).

[31] Subsections (2) and (3) of s 143 so far as is relevant are cast in terms as follows:

> 14 Forms of Charges
>
> (1) ...
>
> (2) If the proprietor and the chargee agree that no dealing shall be registered against the land during the period of the charge, the following covenant shall be included in the charge:
>
> > I (We) ... registered proprietor(s) and I (We) ... Chargee(s), hereby agree that during the period of this charge no dealing shall be registered against the property unless the chargee has given his consent to such registration.
>
> (3) Upon registration of the charge the covenant shall operate as a caveat against the registration of any dealing affecting the land during the period of the charge, unless it is with the written consent of the chargee:
>
> > Provided that nothing in this subsection shall operate to prohibit the registration of ... or a dealing pursuant to an order of a court of competent jurisdiction.

[32] In substance cl 16 and s 143(2) are rather similar, short of prescribing an operative period for the covenant and specifying registration of such dealing in cl 16. Be that as it may, it is clear that like s 143(2), cl 16 is a no dealing clause agreed between the parties in the sense that it forbids any dealing with third parties affecting these lots or any interest therein subsequent to the registration of these instruments without the prior consent in writing of the chargee. Clause 16 implicitly acknowledges the right of the appellant as the registered proprietor to deal with these lots including their sale by private treaty to a third party during the currency of the charges but imposes a restriction on such right by requiring the appellant to secure the prior consent in writing of the respondent as chargee to any such dealing. The restriction is lifted with the consent of the respondent and there is no express reference in cl 16 or in s 143(2) to the court clearly implying that any arrangement arrived at, is strictly between the parties. In other words, the appellant may with the consent of the respondent deal with these lots among themselves or with a third party by private treaty as a business arrangement without resorting to the court. This principle accords with holding (2) of the Supreme Court in *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 cited by counsel for the respondent.

[33] As just said, consent of the respondent is essential for the restriction to be lifted. In practice, such consent is in writing and involves production to the chargor of the issue documents of title, voluntary withdrawal of the caveats (if any) and discharge of the charges simultaneously to enable registration of the transfer of titles of these lots to the third party free from all encumbrances. Such a consent may or may not be forthcoming. The problem arises if consent is withheld or refused by the respondent as in the case of the appellant here. The result is that any attempt by the appellant to exercise his right of sale by private treaty to a third party is checkmated by the respondent.

Legal Issues

[34] The issues raised by these submissions of counsel are twofold:

(a) whether s 150(1) is a provision which empowers the court to make and enables the chargor to apply for an order of sale of charged land; and if so,

(b) whether the words 'or such other mode of sale as may be directed by the court' in s 150(1) are specific enough to authorise a court to order a sale of charged land by private treaty. In connection with this issue we note that the respondent's intended response at (iii) above misses the point, is irrelevant and consequently will not be dealt with in this judgment.

[35] *Vis-a-vis* the respondent as chargee, it is common ground that s 148(2)(c) of Cap 81 (Sarawak) enables it to apply for and the High Court to grant or refuse the order of sale.

[36] Section 148 of Cap 81 (Sarawak) so far as is relevant provides thus:

(1) If default be made in the payment of the principal sum, interest or other moneys secured by a charge, or in the observance of any agreement, expressed or implied in any charge, the chargee may give to the chargor, his personal representatives or assigns, notice in writing that the chargee will resort to all available remedies unless such default be remedied.

(2) If the chargor fails to comply with the requirements of any notice lawfully given, the chargee shall be at liberty to apply to the High Court:

(a) ...;

(b) ...; or

(c) for the sale of the charged land, and the Court after hearing the evidence may make such order as in the circumstances seems just.

(3) ...

[37] In general, and mindful that the legal interest of the chargee created by a registered charge is short of proprietorship, it follows that the chargee has no right to sell the charged land which involves a transfer of title from the chargor to a purchaser for value, without the intervention of the legislature. The legislature did, by s 148(2)(c) of Cap 81 (Sarawak), intervene to empower the court to make an order of sale of the charger's land in default of repayment to the chargee and the latter is thus armed by an order of a competent court with the right to sell. The sale so ordered is a judicial sale and a memorandum of transfer in favour of the transferee is executed by an officer of the court or such other person ordered by the court under s 150(3). Accordingly, we agree with both counsel that s 148(2)(c) is the relevant provision for the chargee to apply and the court to act thereunder. An action under s 148(2)(c) is a charge action falling under O 83 of the RHC and in practice is usually commenced by an originating summons.

[38] Section 150 of Cap 81 (Sarawak) provides thus:

(1) Where any competent court orders the sale of any land subject to a charge, it shall notify the Superintendent of its decision and shall serve a notice of the intended sale upon the chargor and upon the registered proprietor of every other estate or interest in the land. It shall also give notice of the intended sale by advertisement in the Gazette and by such other means as it may deem sufficient. The sale shall be by public auction or tender or such other mode of sale as may be directed by the court subject to such conditions of sale as shall be approved by the court. The court shall also fix the date of the sale, which shall be not less than thirty days from the date of the order of sale, and shall authorize such other acts as may be necessary for the conduct of the sale. A reserve price shall be put on the land which shall be approximately equal to its estimated fair market value.

(2) The chargee may be a bidder at any sale to which subsection (1) relates and become the purchaser of the land or any part thereof.

(3) Where a sale has been effected either to the chargee or to any other person, a memorandum of transfer shall, after payment of the purchase price and such other moneys as may be necessary, be executed in favour of the transferee by such person, including an officer of the court, as the court may order and shall, with the necessary documents of title, presented to the Registrar for registration.

(4) Upon the registration of any memorandum of transfer executed in accordance with this section, the estate or interest of chargor therein expressed to be transferred shall vest in the transferee, freed and discharged from the liability under the charge under which the power of sale has been exercised and from any other estate or interest, except an estate or interest which has priority over the charge or which by reason of the consent of the chargee is binding on him, and the Registrar may make in the Register any entry necessary to show that every such liability, estate or interest has been so determined.

[39] *Vis-a-vis* the appellant as chargor, we do not accept that s 150(1) is a provision empowering the court to make or the chargor to apply for an order of sale. In content, s 148(2)(c) is substantive and enables the chargee to apply for and empowers the court to make an order of sale and the sale if ordered, is a judicial sale. In content, s 150(1) is entirely procedural in the sense that it provides for the procedure for the judicial sale so ordered: it specifies the mode of judicial sale, ie by public auction, public tender or such other mode of sale as the court directs, and sets out the various steps to be followed by the chargee or a third person for the order of sale to be carried into effect. These are directions necessary and consequential upon the order of sale granted as the opening words of s 150(1) clearly indicate and such directions are made under the additional powers of the High Court in para 3 of the Schedule to s 25(2) of the Courts of Judicature Act 1964. In practice the mode of application for such directions is by summons for directions to be taken out by the chargee after the order of sale has been granted by the court.

[40] Thus we observe that firstly, the subject matter of ss 148(2) and 150(1) is the same namely, the judicial sale of charged land by the chargee; and secondly, s 148(2) is substantive whilst s 150(1) is procedural. They are thus inter-related in the sense that they complement one another and are not independent of one another as counsel for the appellant contended.

[41] In general, and mindful again that the chargor remains on the register as the registered proprietor of the charged land, and that it is an incident of such proprietorship that the chargor has the right to deal with the charged land including its disposal by private treaty subject to the consent of the chargee, there is no need for the legislature to intervene on his behalf in this regard and in that sense perhaps it is not incorrect to say that there is no express provision in Cap 81 (Sarawak). For the chargor what the legislature did, was to enact s 145 of Cap 81 (Sarawak) to declare the chargor's right to redeem the charged land.

[42] Any sale of these lots by the appellant, as chargor, by way of private treaty to a third party during the currency of these charges must come under cl 16 of the registered Instrument and s 143(2) and (3) of Cap 81 (Sarawak) and be governed thereby. The sale we speak of here is no other than a sale the proceeds whereof are intended to be paid to the chargee in order to discharge the registered charges. Such a sale may be concluded at any time before or after the respondent, as chargee, commences proceedings in the High Court under s 148. In either case, such a sale must be with the prior consent in writing of the chargee in terms of cl 16 and s 143(2) and (3) without which the sale and transfer would be ineffectual and unregistrable. To that extent Cap 81 (Sarawak) may be said to provide indirectly for such a sale by the chargor with the consent of the chargee while directly protecting the legal interests of the chargee.

[43] In the case of such a sale by the chargor to a third party with the requisite consent of the chargee taking place before the commencement of proceedings under s 148, the sale transaction is strictly a private business matter between the chargor, the chargee and the third party. It does not concern the court and there is nothing in Cap 81 (Sarawak) to say that an order of sale or approval of the court is required.

[44] In the case of such a sale by the charger to a third party with the requisite consent of the chargee after the order of sale and mode of sale is specified, it seems that the court is not *functus officio* and is competent to vary the mode of sale with the consent of the chargor and the chargee (see *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)*). And the order thus varied would probably take the form of a consent order.

[45] The facts of our present case do not come within any of these categories because:

(a) there is no evidence (documentary or oral) of a contract by private treaty, no third party is named or suggested and no price is mentioned for these lots; and,

(b) lack of prior consent in writing of the chargee.

[46] Thus on issue (a) we conclude that s 150(1) does not apply to the appellant as chargor in the sense that it does not enable the appellant as such to initiate a charge action to apply to the High Court for nor does it empower the court to make an order of sale and we hold accordingly. Whether or not s 150(1) empowers the court to make an order of sale by private treaty, ie issue (b), does not arise for determination in this appeal in the absence of a summons for directions under s 150(1) made by the respondent as chargee in the appeal record and also in the light of our conclusion on issue (a). Consequently, we refrain from making any holding or expressing any views whatever on issue (b).

CONCLUSION

[47] For all these reasons stated our answer to the larger question posed much earlier in this judgment is in the negative. We dismiss the appeal with costs. Deposit to the respondent towards the account of taxed costs. Order accordingly.

[48] For the record, our learned brother Mohd Noor Ahmad JCA, the second member of the quorum agreed with the decision and reasons expressed in this judgment before his retirement.

Appeal dismissed with cost.

Reported by Jeyanthi Mala